

1
2
3
4

5 **NOT FOR PUBLICATION**

6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8
9 MERCHANT E-SOLUTIONS INC,

10 Plaintiff, No. C 07-06042 JSW

11 v.

12 COMMUNITY STATE BANK,

13 Defendant.

14 / **ORDER GRANTING IN PART
AND DENYING WITHOUT
PREJUDICE IN PART MOTION
TO DISMISS OR, IN THE
ALTERNATIVE TO TRANSFER**

15 **INTRODUCTION**

16 This matter comes before the Court upon consideration of the motion to dismiss filed by
17 Defendant Community State Bank (“CSB”). Having considered the parties’ papers, relevant
18 legal authority, the record in this case, and having had the benefit of oral argument, the Court
19 **HEREBY GRANTS IN PART AND DENIES WITHOUT PREJUDICE IN PART CSB’s**
20 motion.

21 **BACKGROUND**

22 On or about May 10, 2004, Plaintiff Merchant e-Solutions, Inc. (“MeS”) and Defendant
23 Community State Bank (“CSB”) “entered into a written agreement entitled ‘Agent Bank
24 Agreement - Direct Merchant Program with Cash Advances (“the Direct Agreement”).”
25 (Compl. ¶ 6, Ex. A.) The Direct Agreement provides that it “shall be governed by and
26 construed in accordance with the laws of the State of California. The Parties further agree that
27 in the event of any dispute regarding this Agreement, the courts of the State of California shall
28 have and be vested with personal jurisdiction over the Parties to this action.” (*Id.*, Ex. A § 21.)

1 On or about May 19, 2005, the parties entered into a second agreement entitled “Agent
2 Bank Agreement - Merchant Referral Program With Cash Advances (“the Referral
3 Agreement”).” (Compl. ¶ 9, Ex. B.) Section 24 of the Referral Agreement provides that “[i]f
4 there is an existing agreement regarding transaction processing between MeS and Bank, that
5 existing agreement will be deemed terminated on the effective date of this Agreement and be
6 deemed superseded by this Agreement in all respects.” (*Id.*, Ex. B, § 24.)¹

7 The Referral Agreement further provides that it:

8 shall be governed by and construed in accordance with the laws of the State
9 of California. The parties further agree that in the event of any dispute
10 regarding this Agreement, the courts of the State of California shall have
11 and be vested with personal jurisdiction over the parties to this Agreement.
12 The exclusive venue for any action commenced by the Bank pursuant to or
13 arising out of this Agreement shall be limited to the state or federal courts
located in California, and Bank and MeS hereby submit to such jurisdiction.
*The exclusive venue for any action commenced by MeS pursuant to or
arising out of this Agreement shall be limited to the state or federal courts
located in the State of Bank’s principal place of business location, and Bank
and MeS hereby submit to such jurisdiction.*

14 (*Id.*, Ex. B § 21 (emphasis added). CSB’s principal place of business is in Union Grove,
15 Wisconsin. (*See* Compl., Exs. A, B; Notice of Errata to Declaration of Steven Bell (“Bell
16 Decl.”), ¶ 1.)

17 MeS seeks declaratory relief to resolve a dispute over which of these two agreements is
18 the operative agreement between the parties. (Compl. ¶ 15.) MeS alleges that, although the
19 parties executed the Referral Agreement, the parties continued to operate under the Direct
20 Agreement. (*Id.* ¶ 10.) MeS further alleges that CSB breached “the Direct Agreement by
21 failing and refusing to bear the risk of merchant chargebacks and fraud and to pay MeS ...
22 \$167,106.52 advanced by MeS for merchant chargebacks incurred by three of CSB’s
23 merchants, as required by Sections 2, 4, and 8 of the Direct Agreement.” (*Id.* ¶ 21.) CSB
24 denies these allegations and contends that the Referral Agreement is the operative agreement

25 ¹ The Direct Agreement contains a similar provision. (Compl., Ex. A, § 25.) In
26 addition, both the Direct Agreement and the Referral Agreement contains the following
27 provision: “This Agreement, the exhibits, schedules, attachments, Operating Rules, and all
28 documents referred to herein contain the entire understanding of the Parties as to the matters
contained herein and supersede all previous verbal and written agreements. There are no
other agreements, representations, or warranties not set forth herein or in the documents
referred to herein.” (*Id.*, Ex. A, § 26, Ex. B, § 25.)

1 and that, under the Referral Agreement, it was not required to bear the risk of merchant
2 chargebacks.

3 On October 30, 2007, MeS filed this action against CSB in the Superior Court of the
4 State of California for the County of San Francisco. On November 29, 2007, CSB removed the
5 action to this Court. CSB now moves to dismiss pursuant to Federal Rule of Civil Procedure
6 12(b)(3), for improper venue based on the forum selection clause in the Referral Agreement,
7 and pursuant to Rule 12(b)(6) for failure to state a claim.

8 DISCUSSION

9 A. Legal Standards.

10 A motion to dismiss for “improper venue” based on the enforcement of a forum
11 selection clause is governed by Federal Rule of Civil Procedure 12(b)(3). *Argueta v. Banco*
12 *Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). Unlike a Rule 12(b)(6) motion, a motion
13 under Rule 12(b)(3) does not require that the pleadings be accepted as true, and the Court can
14 consider facts outside the pleadings. *Id.* at 324. However, the Court “must draw all reasonable
15 inferences ... and resolve all factual conflicts in favor of the non-moving party.” *Murphy v.*
16 *Schneider Nat'l. Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004).

17 “Forum selection clauses are *prima facie* valid, and are enforceable absent a strong
18 showing by the party opposing the clause ‘that enforcement would be unreasonable or unjust, or
19 that the clause [is] invalid for such reasons as fraud or overreaching.’” *Manetti-Farrow, Inc. v.*
20 *Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (emphasis and brackets in original)
21 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). “[B]ecause enforcement
22 of a forum clause necessarily entails interpretation of the clause before it can be enforced, ...
23 federal law applies to interpretation of forum selection clauses.” *Id.* at 513.

24 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a
25 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Motions to dismiss are
26 viewed with disfavor and are rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th
27 Cir. 1986). On a motion to dismiss, the complaint is construed in the light most favorable to the
28 non-moving party and all material allegations in the complaint are taken to be true. *Sanders v.*

1 *Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not required to accept legal
2 conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be
3 drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.
4 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

5 **B. CSB's Alternative Motion to Transfer this Action is Granted.**

6 CSB argues that this case must be dismissed or, in the alternative, transferred in light of
7 the forum selection clause contained in the Referral Agreement. MeS does not dispute that it
8 executed the Referral Agreement and does not contend that the forum selection clause is
9 unreasonable, unjust, invalid, or ambiguous. Rather, MeS contends that the forum selection
10 clause is inapplicable because this action was not "commenced pursuant to" and does not "arise
11 out" of the Referral Agreement, in light of the parties' subsequent conduct.

12 The forum selection clause in the Referral Agreement applies to "any action commenced
13 by MeS pursuant to or arising out of this Agreement." (Compl., Ex. B, § 21.) The Court
14 concludes that the term "arising out of" is broad enough to encompass MeS' claim for
15 declaratory relief, because as part of that claim MeS asks that the Court determine that the
16 Referral Agreement is not the operative agreement between the parties. Resolution of that
17 claim will involve some interpretation of the Direct Agreement. *See, e.g., Manetti-Farrow,
18 Inc.*, 858 F.2d at 514; *cf. Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 497
19 (1976) (holding that tort claims "arose out" of contractual relationship between parties and fell
20 within scope of forum selection clause); *cf. Schoenduve Corp. v. Lucent Technologies, Inc.*, 442
21 F.3d 727, 732 (9th Cir. 2006) ("arising out of or relating to" as used in arbitration clause to be
22 interpreted broadly). MeS cannot avoid the effect of the forum selection clause on this basis.

23 With respect to MeS' argument that the parties continued to operate under the terms and
24 conditions of the Referral Agreement, even if the Court accepts those allegations as true, MeS
25 has not set forth facts that suggest the parties conduct intended to waive or negate the effect of
26 the forum selection clause. Therefore, the Court concludes that MeS has not met its burden to
27 show that the clause should not be enforced and the Court HEREBY GRANTS CSB's
28

1 alternative motion to transfer this action to the United States District Court for the Eastern
2 District of Wisconsin.

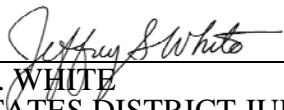
3 In light of this ruling, the DENIES WITHOUT PREJUDICE CSB's motion to dismiss
4 for failure to state a claim and expresses no opinion on the merits of that motion.

5 **CONCLUSION**

6 For the foregoing reasons, CSB's motion to dismiss is GRANTED IN PART AND
7 DENIED WITHOUT PREJUDICE IN PART. The Clerk is directed to transfer this matter to
8 the United States District Court for the Eastern District of Wisconsin forthwith.

9 **IT IS SO ORDERED.**

10
11 Dated: February 22, 2008


12 JEFFREY S. WHITE
13 UNITED STATES DISTRICT JUDGE

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28